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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-60

GERALD TILLEM,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counter-Statement of the Case

In late November or early December 1972, the State Grand Jury returned Indictment No. SGJ 9-72-10A charging the defendant, Gerald Tillem, in eight separate counts with violations of the New Jersey Loan Sharking Act, N.J.S.A. 2A:119A-1 *et seq.* Count One of the indictment charged the defendant with engaging in the business of making usurious loans in violation of N.J.S.A. 2A:119A-3.

Counts Two through Eight charged the defendant with making seven separate loans with an interest rate in excess of 50% per annum in violation of N.J.S.A. 2A:119A-1. On December 20, 1972, defendant entered a plea of not guilty to the charges.

On May 2, 1973, the trial of this indictment was commenced before the Honorable Patrick J. McGann, Jr., J.S.C., and a jury. On May 3, 1973, Judge McGann declared a mistrial when the defense counsel, Robert I. Ansell, learned that his partner had represented a prosecution witness in a bankruptcy proceeding.

The trial of the indictment was re-listed for May 21, 1973 in order to give defendant a chance to engage new counsel. Present counsel, Robert A. Coogan, represented defendant at his trial on May 21, 22, and 23, 1973 before Judge McGann and a jury.

The jury returned verdicts of guilty as charged on all eight counts of the indictment. On June 8, 1973, Judge McGann sentenced defendant to the New Jersey State Prison for a term of not less than two nor more than three years on each of Counts Two thru Eight, and not less than ten nor more than fifteen years on Count One. All sentences were to run consecutively to each other (Da10, 11). On the sentence date defendant filed his Notice of Appeal from the conviction and sentence (Da12).

On appeal to the Appellate Division of the Superior Court the convictions for the individual loans were held to be lesser included offenses of the engaging in the business offense. Thus, the convictions on the individual loans were reversed and the sentences imposed thereon were vacated. *State* v. *Tillem,* 127 N. J. Super. 421, 317 A. 2d 738 (App. Div. 1974).

On June 18, 1974, the Supreme Court of New Jersey denied the defendant's Petition for Certification. On July

29, 1974, defendant's application for a stay in the execution of his sentence pending the outcome of his petition for a writ of certiorari was denied by Justice William J. Brennan, Jr. Defendant's Petition for Certiorari was filed on August 3, 1974.

Counter-Statement of Facts

The State introduced four witnesses all of whom testified that the defendant had loaned them money on very similar terms and under very similar conditions. Richard Grabowski testified that in March 1970 he was under heavy financial pressure and "voiced it around . . . that he was in need of money." (T30-17 to 25). One day a man whom Grabowski had never seen before entered the liquor store where Grabowski worked, asked for Grabowski by name and said that he heard Grabowski needed $500 (T31-20 to 32-4). Grabowski identified the defendant, Tillem, as the man who came to Town Liquors and offered to lend him $500 (T31-8 to 24). The remainder of their conversation concerned the terms of the loan (T32-17 to 20). The $500 had to be repaid in one lump sum (T33-3 to 9), and the interest was to be $35 per week to be paid every week until the principal was repaid (T33-3 to 9). Grabowski accepted these terms and was given the $500 that same day (T33-10 to 19). The defendant called himself "Tommy" (T33-24 to 34-3). The witness made his first interest payment the following day in cash at Town Liquors (T34-12 to 23). After he had paid for two weeks at Town Liquors (T35-6 to 8), the defendant asked him to drop the money off at Vinnie's Luncheonette on Broadway in Long Branch (T35-9 to 14). Grabowski was instructed to put the money in an envelope and put the name "Frankie" on the outside of the envelope (T35-15 to 20). Grabowski made eight or ten payments at Vinnie's Luncheonette to

a short, sandy haired man whom he assumed was Vinnie (T36-6 to 11). The only other person he normally saw at the luncheonette was a red-haired woman (T36-23 to 25). He paid approximately $350 to $400 in interest on those ten or twelve payments (T38-10 to 15). In June of 1972 Grabowksi repaid the entire principal by dropping the money off in a plain envelope at Vinnie's Luncheonette (T38-16 to 39-34; 47-11 to 14). After refreshing his memory by referring to a previous statement, marked S-1 for identification, Grabowski testified that defendant told him that he had other customers (T41-14 to 42-1). Grabowski never pledged anything or signed anything for the loan (T42-2 to 7). He was not acquainted with Martin, Latona, or Schaaff, the other State's witnesses (T42-8 to 14).

As its next witness, the State called Vincent Cannella, the owner of Vinnie's Luncheonette (T55-21 to 56-3). Cannella admitted that his luncheonette was in operation in the spring and summer of 1970 (T56-4 to 8), and that the defendant was his nephew through marriage (T56-12 to 14). The defendant told him that somebody was going to drop something off at his luncheonette, and asked him to hold it for him (T56-17 to 57-7). Defendant asked Cannella to do him this favor in the spring and summer of 1970 but he could not remember the exact date (T56-17 to 18, T57-13 to 15). A day or two after Tillem asked the witness to do him this favor a man came in with an envelope (T58-20 to 59-3). Cannella put the envelope under the counter and held it until the defendant came in (T59-6 to 18). This situation repeated itself "about seven or eight times, maybe nine." (T59-19 to 22). He never gave the envelopes to anyone other than the defendant. He did not think that there was ever an occasion where the defendant failed to pick up an envelupe that had been delivered for him (T60-20 to 22). The witness could not

identify the man who dropped off the envelope (T62-15 to 17).

Thomas Martin, a stock broker with the firm of Fahnestock and Company, testified that he asked Donald Latona, an associate of his whom he knew had a loan outstanding, to arrange a loan for him also (T68-13 to 19, 69-9 to 22). A meeting was arranged with Martin, Latona, and defendant in the parking lot near Fahnestock (T69-3 to 8, 23 to 25). Martin then identified the defendant in open court (T68-20 to 69-2). The purpose of the meeting was to discuss the arrangements for a $2000 loan. The interest payments on principal were to be $5 per $100 per week with the interest being paid once a week (T70-13 to 18). Thus, Martin's interest payment was $100 a week. There was no discussion as to how the principal was to be repaid (T70-2 to 8). Martin was contacted about three days later by telephone (T71-9 to 18). The same evening that he received the call from Tillem, he met the defendant in the parking lot outside Fahnestock and received the $2000 (T71-19 to 72-16). That meeting took place on a Monday night (T72-3), and the first interest payment was due that Friday (T72-20 to 25). Interest payments were to be made in cash at the same parking lot where the two prior meetings had occurred (T73-1 to 6). Martin made an interest payment of $100 that Friday (T73-7 to 14). The interest was delivered by Martin to Tillem usually at the same location (T74-1 to 8). The loan occurred in August of 1971 and Martin paid approximately $1600 in interest on the loan (T74-9 to 22). The principal was repaid in early January 1972 (T74-23 to 75-4). Martin paid $3600 on the original $2000 loan (T75-5 to 7).

On a few occasions Martin was instructed to leave his interest payments at Little Silver Pizza instead of at the parking lot (T75-8 to 12). These instructions were given to him by Tillem. He was instructed to put the money in

an envelope, write his own name on it, the defendant's name and leave it with "Albie" (T75-13 to 18). This happened two or three times (T75-22 to 25). The $2000 repayment of principal was also made at Little Silver Pizza (T76-13 to 20). When Martin made the $2000 payment, Albie was not there. The man working at the pizza place asked if the envelope was for Gerry. Martin answered that it was (T76-7 to 10).

This loan was repaid in January 1972. In February, Martin again approached Tillem about a loan (T77-9 to 13). Martin asked for a $1000 loan and Tillem said he would let him know (T77-14 to 18). Later, defendant contacted Martin and they met in the parking lot near Fahnestock (T77-9 to 25). At this meeting Martin asked the defendant for $2000, $1000 for himself and $1000 for Latona (T78-1 to 6). The loan was made in February 1972 with the same terms as the prior loan (T78-12 to 21). The interest payments were made in the same way, but now the loan was being shared by Martin and Latona (T78-22 to 79-3, 79-11 to 15). As in the prior loan there was never any pledge, note, promise, or even any discussion about what recourse defendant would have should the borrowers default (T76-25 to 77-8, 79-16 to 20). About 12 interest payments were made on this loan, the last one in May 1972. At the time of the trial the entire principal was still due and owing (T79-21 to 80-9, 82-12 to 18). At this point Martin was contacted by Detective Castellano of the New Jersey State Police (T80-10 to 15). Tillem, aware of this fact, contacted Martin and told him that some other way to make the payments would have to be arranged "because the heat was on and he (Tillem) knew that there was some pressure." (T81-4 to 10).

After this conversation with Tillem, Martin made three more interest payments of $100 each, all of which suddenly applied to the principal, thus reducing the principal

to $1700 (T81-16 to 82-1). Interest payments had never before in Martin's dealings with Tillem been applied to principal (T82-2 to 5). Tillem contacted Martin several times about making payments on the principal, but Martin made no payments (T83-4 to 12).

The State called Jimmy Lee Boughten as its next witness. Boughten testified that he was employed at the Little Silver Pizzeria in Little Silver, New Jersey in 1971 (T96-7 to 16). The witness stated that he knew the defendant from working at the pizzeria and identified him in open court (T97-2 to 7). During November or December 1971, various individuals came into the Little Silver Pizzeria and left envelopes with "Albie" for the defendant (T97-14 to 98-15). The envelopes had the name Gerry written across the front (T98-17 to 19). Some of the envelopes had the name Tom in one corner of the envelope (T99-1 to 7). He was familiar with the people who left these envelopes for the defendant and they were separate individuals (T99-20 to 24). One of the individuals was named Tom and the other Art (T100-3 to 4). Boughten knew that there was money in the envelopes because defendant, whose voice he recognized, called the store and asked him if there was any money for him. Boughten answered that there was just an envelope and Tillem responded, "Well, that's it. I'll be in later to pick it up." (T101-2 to 5, 101-15 to 102-15). Tillem was the only one who picked up the envelopes and to the best of the witness' recollection he picked up every single envelope that was left at the store (T102-22 to 103-2).

The State called Harold Schaaff as its next witness. Schaaff testified that in February 1970 he operated a flower shop at 1568 Broadway, Long Branch (T112-11 to 113-4). He was in need of operating capital for his business and contacted the defendant to arrange a loan in March 1970 (T113-5 to 15 21 to 23). Schaaff borrowed

$500 with a $25 per week interest payment which did not reduce the balance of the principal (T115-6 to 21). The interest payments were made to the defendant at Schaaff's store (T116-22 to 116-8). In November 1970, Schaaff again asked for a $500 loan with the $500 prinicpal of the first loan still outstanding (T116-19 to 117-14). The interest payments on the second loan were the same as the first, with the result that Schaaff paid $50 per week in interest payments from November 1970 on (T117-15 to 118-1). In March of 1971, Schaaff requested a third $500 loan (T118-8 to 14). Tillem made this loan also, but the interest payments were $30 a week instead of $25. Thus, Schaaff was paying $80 per week in interest on the three loans with $1500 in principal still due and owing (T118-21 to 119-15). The last interest payment that Schaaff made was in May 1972.

The witness calculated that he made 110 interest payments on the first loan (T120-12 to 17), for a total of $2750 (T121-2 to 5). He made 72 interest payments on the second loan which amounted to $1800 total interest (T121-6 to 13). He made 22 payments on the third loan for a total of $1500 in interest (T121-14 to 21). Schaaff had not repaid any of the principal on any of the three loans (T122-4 to 6). He was contacted by Detective Castellano of the New Jersey State Police in May of 1972 (T122-7 to 14). The witness told defendant about his meeting with Castellano (T122-15 to 18), and defendant told him that he realized he was under a lot of pressure and he wouldn't have to pay any money now (T122-19 to 22). The defendant also told Schaaff that if he was questioned he should say that he had never borrowed any money from the defendant (T123-4 to 8, 21-24). Schaaff made no payments of principal or interest after May 1972 (T123-25 to 124-5). S-2 for identification was a journal identified by the witness as his notes on his interest pay-

ments (T124-15 to 125-1). He then read S-2 to the jury (T125-8 to 127-12). Prior to these proceedings Schaaff had never met Latona, Grabowski, or Martin (T127-17 to 128-1). Schaaff never put up any collateral to secure the loans (T128-6 to 9).

Detective Raymond Castellano of the New Jersey State Police testified that in May and June 1971 he conducted a surveillance of the defendant. During the course of that surveillance he took a series of photographs of defendant's meetings with Donald Latona (T145-4 to 146-20). These photographs were admtited into evidence. In May 1972 he conducted a surveillance of the parking lot adjacent to Fahnestock and Company in Red Bank, New Jersey (T148-19 to 149-5). At that time Castellano saw Latona leave the brokerage house and meet defendant in the parking lot (T149-6 to 11).

As its next witness the State called Donald Latona. Latona testified that he met the defendant in the summer of 1971 and in late May 1971 asked him for a loan (T160-17 to 24). Tillem told Latona that he would let him know about the loan in a week. At the end of a week the defendant came back and loaned Latona the $4000 he had requested (T161-3 to 10). The terms of the loan were $50 of interest per $1000 of principal per week. Thus, Latona paid $200 a week in interest (T161-17 to 22). The interest payments did not reduce the principal (T161-25 to 162-1). The loan was incurred in the first week of June 1971 and his interest payments were made once a week on Friday (T162-2 to 15). Latona made six or seven months of the $200 interest payments (T163-2 to 9). No weekly interest payment was ever less than $200 (T163-18 to 19). He paid back the $4000 in January or February 1972 (T163-22 to 25). On a few occasions Latona left envelopes addressed to Tillem at the Little Silver Pizzeria in Little Silver, New Jersey (T164-11 to 18).

Latona testified that he introduced Martin to the defendant at Martin's request (T165-2 to 17). Martin wanted to meet Tillem because he needed some money (T166-2 to 8). At times Latona made interest payments for Martin to Tillem. In February 1972 Martin contacted Latona again and said that he was going to borrow another $1000 from the defendant. Latona asked Martin to see if he could get another $1000 for him also (T166-7 to 167-1). Martin did get the $2000 and both Martin and Latona paid $50 a week interest on that loan (T167-4 to 12). Latona made about 14 or 15 weeks of interest payments on the second loan (T168-1 to 4). In May of 1972 Latona was contacted by Detective Castellano of the New Jersey State Police (T168-5 to 9). On the same day that Latona saw Detective Castellano he also saw the defendant in the parking lot next to Fahnestock (T168-16 to 25). Two days later the detective returned to Fahnestock to interview Latona (T169-17 to 23). Tillem wanted to know what was said at that interview and any subsequent interviews (T169-24 to 170). About two weeks later the defendant informed Latona and Martin that they no longer had to pay any interest on their loans; every payment became a reduction of principal (T170-10 to 22). Neither Martin nor Latona ever paid off their loans (T170-23 to 171-1). Latona never signed a note, or pledged any security against default on either loan (T171-7 to 16).

The State then introduced Leon Wojna, an accountant employed by the State of New Jersey, as an expert witness (T185-14 to 186-8). Wojna testified in answer to a hypothetical question that where $500 was loaned for a period of ten weeks with the debtor paying interest in the amount of $350, the rate of interest was 364 per cent (T190-1 to 15). Where $3000 was loaned for 16 weeks with an interest payment of $1600, the rate of interest

was 268 per cent (190-16 to 191-1). On a loan of $2000 for 12 weeks, with an interest payment of $1200, the rate of interest was 260 per cent (T191-12 to 15). On a loan of $500 with a time period of 72 weeks, and a total interest payment of $1800, the rate of interest was 260 per cent (T191-19 to 21). On a loan of $500 for 52 weeks, with interest of $1560, the rate of interest was 312 per cent (T191-22 to 25). On a loan of $4000 for a period of 28 weeks with the total payment of $5600, the rate of interest was 260 per cent (T192-1 to 4).

At the conclusion of Wojna's testimony the State rested its case (T206-8). The defense rested its case without calling any witnesses (T219-9 to 11).

LEGAL ARGUMENT

N.J.S.A. 2A:119A-3 is neither vague nor repugnant to the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Defendant argues, as he did at trial and in the appellate courts, that the language of N.J.S.A. 2A:119A-3 is so unconstitutionally vague as to be in violation of the Due Process Clause of the Fourteenth Amendment. N.J.S.A. 2A:119A-3 reads as follows:

> "Any person who engages in the business of making loans or forebearances prohibited by section 1 of this act, or who conspires so to do, shall be guilty of a high misdemeanor and shall be punished by a fine of not more than $10,000.00, or by imprisonment for not more than 25 years, or both."

N.J.S.A. 2A:119A-1, incorporated by reference in the above-quoted statute, reads as follows:

> "Any person who, not being authorized or permitted by law so to do, charges, takes or receives any money, property or other thing of value as interest on the loan or forbearance of any money or other property at a rate exceeding 50% per annum or the equivalent rate for a longer or shorter period, is guilty of a misdemeanor and shall be punished by a fine of not more than $5,000.00 or by imprisonment for not more than 5 years, or both."

Defendant argues that the act does not provide a definition for "engaging in the business" of making the prohibited loans and is therefore unconstitutional. The State believes that this contention is without merit.

It is true that no definition of "engaging in the business" appears in the statute itself. However, that failure is not dispositive of the issue raised herein. It is well settled that the language of the statute "must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Connally* v. *General Construction Co., Inc.*, 269 U. S. 385, 391 (1926). "(A) statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application" violates the Due Process Clause. *Id.* The crime, and the elements constituing it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. *Id.* at 393. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453 (1929). This rule has been reiterated time and time again in this Court and in the New Jersey Supreme Court. See especially, *Giaccio* v. *Pennsylvania*, 382 U. S. 399 (1966); *McGowan* v. *Mary-*

land, 366 U. S. 420 (1961); *Lanzetta* v. *New Jersey, supra; State* v. *Lair*, 62 N. J. 388, 301 A. 2d 748 (1973); *State* v. *Moretti*, 52 N. J. 182, 244 A. 2d 499 (1968); *State* v. *Monteleone*, 36 N. J. 93, 175 A. 2d 207 (1961). The State submits that the language of N.J.S.A. 2A:119A-3 does not run afoul of this rule.

In support of its argument that the language of the statute is clear, witness the following excerpt of the trial court's charge to the jury:

> "Now, what does the statute mean by someone who engages in the business of making loans? What do we mean by business? Well, business as used in the statute pertains in a very broad sense to all gainful activity. A business could be called occupation or work of some sort in which a person is engaged on a regular basis.
>
> If a person engages in a certain type of transaction once and that's all, you certainly wouldn't consider that person to be in the business. If, however, that type of conduct is repeated to the extent that there is a certain regularity to that type of conduct, then it could be inferred properly that that person was in that business. It's in that sense that we use the term business that I have just read to you." (T288-25 to 290-6).

The appellate court quoted this portion of the charge with approval and added a similar explanation.

> "Giving the statutory words their common, ordinary, common sense construction, they can be defined as meaning one who carries on an enterprise, a business or a profession for profit or improvement over a period of time, as distinguished from

> one who commits or occasionally participates in a single act or transaction." *State* v. *Tillem*, 127 N. J. Super. at 425.

Thus, the trial court, the appellate court and the jury all agreed that the meaning of the allegedly vague phrase was abundantly clear.

The facts of the instant case provide an even more compelling argument that defendant was not misled by the language of the statute. The State proved beyond a doubt that defendant made seven separate loans to four individuals over a period of approximately two years. For each loan the debtor was required to make a weekly interest payment which on occasion involved a meeting with the defendant. This continuous ongoing activity involving a substantial amount of time and effort makes it very clear that defendant was, in fact, engaged in the business of making usurious loans.

Moreover, defendant ignores the fact that each individual loan was clearly proscribed by N.J.S.A. 2A:119A-1. Thus, defendant is in effect arguing that he knew each individual loan was a criminal act, but could only guess what combination of those individual illegal acts constituted engaging in the business as proscribed by N.J.S.A. 2A:119A-3. Such a position smacks of sophistry, and robs defendant's argument of any force.

In support of his argument defendant attempts to compare the loansharking statute to New Jersey's former anti-gangster statute struck down by this Court in *Lanzetta* v. *New Jersey*, *supra*. The State submits that such a comparison is specious. In *Lanzetta*, the common everyday meaning of the word gang was properly held to be ambiguous in the absence of a precise statutory definition. Lacking such a definition the act was declared unconstitu-

tional. *Lanzetta,* at 458. It is interesting to note that the *Lanzetta* court listed many possible meanings for the word "gangs" and "gangster". However, defendant has failed to offer one example of a confused or vague meaning for the phrase "engaging in the business." Thus, it is clear that the statute is not void for vagueness.

In conclusion, it should be stressed that the New Jersey Loan Sharking statute is neither vague nor unclear and there is no real danger that the statute can be misinterpreted. Thus, there is no compelling reason why this Court should grant defendant's petition.

CONCLUSION

For the aforementioned reasons, respondent, State of New Jersey, respectfully prays that the petition for a writ of certiorari sought in the above named petition pending before this Court not issue.

Respectfully submitted,

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